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No. 86-1712

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANSAMERICAN NATURAL GAS CORPORATION
(formerly GHR Energy Corporation),
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and
WILLIAM P. CLARK, Secretary of the Interior,
Respondents.

On Petition for a Writ of Certiorari to the
Temporary Emergency Court of Appeals
of the United States

REPLY BRIEF OF PETITIONER

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ARGUMENT

**I. The Petition Presents Issues of Immediate, Not Merely
Historical, Importance**

Respondents misstate the case in urging that it involves nothing more than an arcane dispute over discontinued price controls (*see* Brief in Opp., at 7). The fundamental question is the Government's amenability to suit. The specific issue is whether a litigant seeking to enforce private rights originating in contracts with the Government, authorized by a statute that waives sovereign immunity, will be foreclosed from all judicial relief because the contracts incorporate by reference, for certain of their terms, a federal statute that does not expressly waive sovereign immunity.

The case pits the constitutionally protected, private rights of the citizen directly against the perceived dictates of a federal policy embodied in a regulatory statute. It raises a most fundamental issue of the faith, credit, and obligation of the United States, namely, whether the citizen can rely on the availability of a federal forum for the enforcement of his contract rights, or whether he contracts with the Government at his peril, taking to himself all the risks and liabilities of the contract, but receiving none of its customary protections, such as mutuality of obligation, which constitute property rights. In addition, this specific case, because of its unusual jurisdictional setting, also involves the questions of which federal court properly hears the case, and which court has the power to review disputed issues. These are not questions of a passing or merely historical importance. Instead, they go to the very heart of a private citizen's commercial relationship with the Government and to the foundation of the federal judiciary's authority to resolve commercial disputes between the Government and private parties.

Respondents necessarily hold to the very narrow view, as did the TECA in reaching its decision, that this case "arises under"—and only under—the ESA. Based on this unduly constricted first premise, they conclude both that the Government is immune from suit and that the TECA has exclusive appellate jurisdiction over every issue in the case. In so doing, they ignore other equally justifiable sources of petitioner's right, such as the statute authorizing the Government's entry into the contracts in the first place (the OCSLA, which expressly waives sovereign immunity), the Constitution, and the contracts themselves (which traditionally have sufficed as grounds for invoking federal jurisdiction and overcoming sovereign immunity). Petitioner is entitled to a broader review of its pleading, which essentially alleges that it bought oil from the Government under contract and was overcharged. Any theory or form of action that

sustains this claim will be a basis for relief and should be separately evaluated in determining whether sovereign immunity bars relief and whether jurisdiction is properly exercised. *See Conley v. Gibson*, 355 U.S. 41, 48 (1957).

The TECA's limited view stems, understandably, from its special-purpose jurisdiction. The TECA, unlike the other courts of appeals, has an openly avowed, policy-based mandate "to wind up regulation of the oil industry." *Johnson Oil Co., Inc. v. DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). It is a court with a mission, and that mission, not the law, has produced the judgment sought to be reviewed. In a different case, such vindication of a "predominant" federal policy (*see* Brief in Opp., at 7) by a special-purpose tribunal might be seen as a laudable result, but here it is not, because important, constitutionally protected, private contract rights have been trampled in the bargain. Not only should this wrong be righted, but the Court should also take the opportunity afforded by this case to reaffirm that rights acquired under contract with the Government continue to be, as they traditionally have been, protected and are enforceable in the federal courts, that they cannot be vitiated by an after-the-fact claim of sovereign immunity, and that they are not subordinate to the vicissitudes of federal commercial policy.

II. The Court Should Resolve a Conflict Among the Circuits Concerning The TECA's Jurisdiction and Instruct Litigants and the Lower Courts on How to Apply the Appropriate Jurisdictional Standard

Contrary to respondents' statement (Brief in Opp., at 5), the Circuits are in conflict concerning the scope of the TECA's jurisdiction. The Second, Third, Fifth, Tenth, and District of Columbia Circuits, as well as the TECA, interpret the TECA's jurisdictional grant over cases and controversies "arising under" the ESA as requiring "bifurcated" appeals whereby the ESA is-

sues in a single controversy are reviewed by the TECA, and the non-ESA issues in the same controversy are reviewed by the appropriate court of appeals. *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979); *RJG Cab, Inc. v. Hodel*, 797 F.2d 111 (3d Cir. 1986); *United States v. Wyatt*, 680 F.2d 1080 (5th Cir. 1982); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979); *United States v. Hill*, 694 F.2d 258, 260 n.5 (D.C. Cir. 1982); *Texaco Inc. v. DOE*, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979). This interpretation results in the possibility of conflicting appellate judgments in a single case.

By contrast, the Sixth and Seventh Circuits construe the TECA's jurisdiction as arising only when the *entire* claim "arises under" the ESA, *Grand Blanc Educ. Ass'n v. Grand Blanc Bd. of Educ.*, 624 F.2d 47 (6th Cir. 1980); *St. Mary's Hospital of East St. Louis, Inc. v. Ogilvie*, 496 F.2d 1324 (7th Cir. 1974), thereby safeguarding against conflicting appellate judgments in the same case, but raising the possibility that truly different theories of relief, some perhaps arising under the ESA, others not, will be inappropriately lumped together for the expedient purpose of characterizing a claim and allocating jurisdiction. Neither of the prevailing interpretations furnishes an arbiter for jurisdictional disputes arising within the same case, nor does either interpretation articulate a standard for identifying so-called ESA issues or claims, and the Court has not previously addressed the issue.

The TECA's special jurisdiction, and the conflicting interpretations as to its scope, naturally produce confusion in the large number of cases, like this one, which present either a number of claims or allege different theories of relief. As of 1979, approximately thirty percent of the TECA's cases were decided on jurisdictional grounds, *Texaco Inc. v. DOE*, 616 F.2d 1193, 1199 (Temp. Emer. Ct. App. 1979) (Hoffman, J., dissenting),

and Congress's purpose in creating the TECA to achieve efficient and consistent review of ESA cases, see *Bray v. United States*, 423 U.S. 73, 74 (1975) (per Curiam), has been frustrated, with review often degenerating, as here, into multiple appeals, stays, and dismissals owing to uncertainty about the boundaries of the TECA's jurisdiction. See generally *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711 (Temp. Emer. Ct. App.) (per curiam), cert. denied, 444 U.S. 879 (1979); *Gordon v. Laborers' Int'l Union*, 490 F.2d 133 (10th Cir.), cert. denied, 419 U.S. 836 (1974).

The prejudice of such confusion is plainly apparent in the present case. One appellate court, the Fifth Circuit, which has jurisdiction over any issue in the case that does not "arise under" the ESA, deferred, at least preliminarily, to the other appellate court, the TECA, which has claimed full jurisdiction (possibly for policy-based reasons), but which ultimately may not be entitled to exercise it. The confusion—and, hence, dispute—over whether petitioner's claims are jurisdictionally within the TECA's or the Fifth Circuit's province, or partially in both, has required petitioner to prosecute parallel appeals and to make and defend against numerous motions in order to preserve its procedural entitlement to a full review of all issues in each court. Nor is this the first case in which an appellate court has been tempted to defer to the TECA's claim of complete jurisdiction. In *Gordon v. Laborers' Int'l Union*, 490 F.2d 133 (10th Cir. 1974), the Tenth Circuit, though harboring serious doubts as to the wisdom of the TECA's prior ruling in the case, nonetheless deferred to the TECA's presumption of jurisdiction, accepting it, in the absence of any attempt to obtain certiorari review, as the "law of the case" in order to "avoid any semblance of a conflict with TECA." *Id.* at 139.

The present case squarely presents the conflict avoided by the Tenth Circuit in *Gordon* and points to the need for a standard with which to determine whether a case

"arises under" the ESA. Without it, litigants are left in confusion, and policy, not law, ultimately determines the parties' rights, including the important question of jurisdiction. We respectfully submit that the present case does not "arise under" the ESA, and that the TECA's determination that it does is erroneous and has led to the further erroneous conclusions concerning sovereign immunity and jurisdiction. A properly formulated "arising under" standard will allocate original and appellate jurisdiction in cases that allege numerous claims or separate theories of relief, and will also have the salient effect of reducing confusion, duplication, delay, and expense.

CONCLUSION

Some court of the United States must be competent to determine the liabilities of the United States on petitioner's commercial contracts. The petition should be granted so that the Court can confirm that contract rights do not yield to changing federal policy, and that sovereign immunity does not bar a private party's claim merely because a federal statute not expressly waiving sovereign immunity is incorporated by reference in a contract to which the Government is an authorized party. The petition should also be granted so that the Court can instruct litigants and the lower federal courts concerning the proper limits of the TECA's jurisdiction.

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